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82-359
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,
v.
THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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August 31, 1982

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QUESTIONS PRESENTED

1. When a Native American tribe has accrued causes of action against third parties for trespass to its land held under aboriginal title, may the United States take those causes of action without payment of just compensation?

2. Can the United States avoid payment for taking some of the Inupiat Eskimos' causes of action by retroactively extinguishing portions of their aboriginal title?

3. Do statutes, regulations and the common law that specifically prohibited entry upon lands used and occupied by Inupiat Eskimos give rise to legally enforceable claims for money damages against the United States for breach of fiduciary duty by its officers who failed to prevent, or attempted to authorize, trespasses to those lands?

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Inupiat Community of the Arctic Slope, the recognized tribal representative of the Inupiat Eskimos, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims, not yet reported, appears in the Appendix hereto (App. 1a-18a). The opinion of the Court of Appeals for the Ninth Circuit in the related case of *United States v. Atlantic Richfield Company* is reported at 612 F.2d 1132 (1980), *cert. denied*, 449 U.S. 888 (1980). The opinion of the district court in that case is reported at 435 F.Supp. 1009 (D. Alaska 1977). The opinion in the related case of *Edwardsen v. Morton* is reported at 369 F.Supp. 1359 (D.D.C. 1973).

JURISDICTION

The judgment of the Court of Claims (App. 18a) was entered on June 2, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 4 of the Act of December 18, 1971, the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinquished.

Section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26:

> [T]he Indians or other persons in said district [of Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such

persons may acquire title to such lands is reserved for future legislation by Congress.

Section 14 of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1100:

> [N]one of the provisions of the last two preceding sections of the act shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupation . . . .

Section 27 of the Act of June 6, 1900, ch. 786, 31 Stat. 321, 330:

> The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation . . . .

43 C.F.R. § 2091.6-3 (1981):

> Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others.

STATEMENT OF THE CASE

The Arctic Slope of Alaska is a remote area of Northern Alaska lying between the Brooks Range and the Arctic Ocean. The Inupiat Eskimos have lived and hunted there for thousands of years. This use and occupancy gave rise, under settled federal common law, to a right of possession that could be terminated by the sovereign without compensation but which, until terminated, was "as sacred as the fee-simple of the white." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668-69 (1974).

Until the 1960's there was virtually no non-Eskimo activity on the Arctic Slope. In the mid-1960's, however, the State of Alaska began making selections of land on the Arctic Slope under color of the Alaska Statehood Act,

72 Stat. 339, and issuing conditional oil and gas leases on "tentatively approved" land selections. Because, under the Statehood Act, Native land was expressly excluded from selection,[1] the Inupiats and the Bureau of Indian Affairs protested Alaska's actions.[2]

In November 1966, in response to the Native protests, the Secretary of the Interior suspended all tentative approvals of Alaska's land selections and all federal leasing in Alaska.[3] Oil exploration continued, however, both under color of conditional state leases and without any authorization whatsoever. In February 1968, Atlantic Richfield struck oil at its Prudhoe Bay State No. 1 well, and the stream of exploration on the Eskimos' Arctic Slope lands became a flood:

> Within the space of a few months, oil explorations uprooted and destroyed the wilderness character of an area larger than Massachusetts. By January 1969, more than a dozen companies holding exploration leases were in a mad scramble for a piece of the action, jockeying for position in haste and secrecy, driven by sheer compulsion as well as need. Seismic crews roamed the area in amphibious vehicles drilling the subsurface and testing it with explosives.[4]

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[1] Alaska Statehood Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339, §§ 4, 6 (1958), 48 U.S.C., note preceding § 21; *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).

[2] The history of the protests is discussed in S. Rep. No. 92-405, 92nd Cong., 1st Sess. 96-97 (1971).

[3] The suspension is described in S. Rep. No. 92-405, 92nd Cong., 1st Sess. 97 (1971); *see also* P.L.O. 4582, 34 Fed. Reg. 1025 (1969) (extending land freeze).

[4] From, "Hickel and the Arctic," *Field and Stream* (Nov. 1969), quoted in *Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, 275 (1969).

These actions of the State of Alaska and the oil companies resulted in massive trespasses to Inupiat lands—trespasses investigated and alleged by the United States in related litigation as including:

(a) removing vast quantities of sand and gravel;

(b) disturbing migratory or feeding patterns of sea mammals, fish, and game to the detriment of Eskimo hunting and fishing;

(c) damaging physical property such as buildings, campsites, hunting and trapping grounds, cellars and caches;

(d) killing game animals to the significant detriment of the Eskimos;

(e) constructing airfields, buildings, roads, living units, drilling pads, and other structures;

(f) damaging Eskimo graveyards and consecrated areas;

(g) extracting quantities of oil and gas; and

(h) obtaining geophysical information of great value.[8]

These trespass causes of action accrued to the Inupiats in the 1960's. They are of major importance to the Inupiats both in dollars of damages and as a means to redress a deeply felt wrong.

On December 18, 1971, the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-27 ("ANCSA") became law. Section 4 of the Act terminated all aboriginal title in Alaska. The Inupiats, who had opposed the Act as unfairly distributing their land and oil wealth to others, understood the Act not to terminate their substantial pre-Act trespass causes of action.

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[8] Complaint of the United States, ¶ 10, pp. 6-7, *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

After ANCSA's enactment and in settlement of the related case of *Edwardsen v. Morton*,[6] the United States investigated the trespass claims, found that there was credible evidence of substantial damage and, joined by the Inupiats as intervenors, sued the oil companies and the State of Alaska. Their complaints, however, were dismissed on the ground that the United States had extinguished both aboriginal title and the Inupiat's causes of action in trespass in Section 4 of ANCSA. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).[7] The Ninth Circuit did not reach the issue whether the Inupiats' causes of action were property protected by the Fifth Amendment but noted that if they were

> the Inupiats might recover as just compensation from the United States the same amount that they could have recovered from the trespassing private defendants in the absence of the Act.

612 F.2d at 1139. This Court denied petitions for writs of certiorari by the United States and the Inupiats.[8]

The Inupiats filed the present petition in the Court of Claims on December 16, 1977, less than six years after

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[6] 369 F. Supp. 1359, 1378-79 (D.D.C. 1973), *dismissed as moot* (Feb. 16, 1977). In this case the Inupiats' sought, *inter alia*, an accounting from the United States for money it had received from pre-ANCSA trespassers to Inupiat lands. After the district court denied summary judgment on this issue to the federal defendants, the case was settled upon the Secretary of the Interior's agreement to investigate the claims and to bring suit against the oil companies and the State of Alaska on those claims he found were factually meritorious.

[7] In *Edwardsen v. Morton, supra*, Judge Oliver Gasch of the District of Columbia ruled that the Inupiat's causes of action had not been extinguished by ANCSA in part because those causes of action were property rights protected by the Fifth Amendment. 369 F. Supp. at 1379.

[8] 449 U.S. 888 (1980). Justice Blackmun would have granted certiorari; Justices Stewart and Powell took no part in the Court's decison.

the effective date of ANCSA. The Court of Claims had jurisdiction over their claim against the United States under 28 U.S.C. § 1505. Essentially, the Inupiats alleged that their pre-ANCSA causes of action against third parties were property protected by the Fifth Amendment; that this property had been taken by the United States; and that they have not received just compensation for the taking. The Inupiats also alleged that the United States was liable to them for breaches of fiduciary duty in failing to protect their land from trespass and for denials of due process of law in permitting selections of Inupiat land to be made without affording the Inupiats a hearing.

The Court of Claims granted the United States' motion to dismiss. That court held that since the Inupiats' title to land was extinguishable without payment, their existing trespass actions against third parties were also extinguishable without payment of just compensation (App. 8a-13a). The court further held that the United States' trust responsibility did not give rise to an action for money against the United States (App. 13a-17a). Finally, the court held that it had no jurisdiction over claims for money based on violations of the due process clause.[9]

REASONS FOR ISSUING THE WRIT

No court has ever heard the Inupiats' trespass actions on the merits, or determined whether just compensation has been paid for their taking. Certiorari should be granted to review the decision of the Court of Claims because that decision conflicts with settled law as expressed in the decisions of this court.

I. THE DECISION OF THE COURT OF CLAIMS IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

1. Under settled law, land used and occupied by Native Americans since time immemorial is deemed held by

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[9] App. 17a-18a. Petitioner does not seek certiorari on this issue.

them under aboriginal title. *E.g.*, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941); *accord*, *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Aboriginal title gives Indians no permanent ownership rights against the United States, which can, acting through Congress, terminate such title without compensation. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Until extinguished, however, aboriginal title does give Indians important rights of possession. Since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), this Court has repeatedly emphasized that under federal common law Indians are entitled to exclusive possession and quiet enjoyment of their aboriginal lands, rights "as sacred as the fee-simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation v. County of Oneida*, 441 U.S. 661, 668-69 (1974).[10] Until the sovereign extinguishes aboriginal title, the Indians have "a legal as well as a just claim to retain possession of [their lands] . . . ." *Johnson v. M'Intosh*, 21 U.S., at 573.

> As against any but the sovereign, original Indian title was accorded the protection of full fee ownership, but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will.

United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). *Tee-Hit-Ton* itself expressly reaffirmed the guaranteed status accorded Indian's possessory rights "which the sovereign grants and protects against intrusion by third parties . . . ." *Id.* at 279.

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[10] Additional cases holding to the same effect are: *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 345 (1941); *Cramer v. United States*, 261 U.S. 219, 227 (1923); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831) (Baldwin J., concurring); *see Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 603 (1823).

Prior to the extinguishment of aboriginal title, therefore, no one has a right to occupy or trespass on Indian land without the Indians' consent. See, *e.g.*, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, 359-60 (1941); *Cramer v. United States*, 261 U.S. 219, 229, 234 (1923).

Indian tribes with a right to possession free from trespass also, of course, have a right to recover damages from trespassers.[11] Trespass claims are based not on ownership of land but on possession. Even a tenant at will has a right to recover for trespasses by third parties.[12]

Because the right to redress for trespass is compensation for interference with *possession*, not ownership, an occupant of land is entitled to redress—regardless of the underlying ownership or the nature of the occupancy—so long as the occupant's right of possession is superior to that of the trespasser. Thus, a trespass action can be maintained for interference with possession

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[11] Possessory rights in land held by Indian tribes include the power to command the aid of the law against trespassers, coupled with the privilege to use reasonable force to exclude trespassers. Indeed, an assertion of possessory right is meaningless if these elements are lacking. The right to protection of tribal possession through actions of ejectment, trespass or other similar possessory suits was affirmed early in the nation's history.

F. Cohen, *Handbook of Federal Indian Law* 523 (1982 ed.) (footnotes omitted); *see id.* at 252, 524; *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850) (upholding ejectment action); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857) (upholding trespass action); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (action in the nature of ejectment).

[12] A cause of action for trespass accrues when someone intrudes on land that another person possesses or has the right to possess. *Restatement (Second) of Torts* §§ 157, 158 (1965). No legal title is required to support an action for trespass. *Id.* § 157, Comment b (1965); W. Prosser, *The Law of Torts* § 13 (4th ed. 1971). A mere tenant at will can maintain a trespass action. 49 Am. Jur. 2d *Landlord and Tenant* § 292 (1970).

even though no ownership rights exist and even where the title is transferred away after the trespass [13] or there is a complete taking of title by the sovereign.[14] In *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857) this Court upheld an Indian trespass action against non-Indians on the express ground that the Indians had a possessory right superior to that of the trespassers even though the Indians' ownership rights had previously been terminated by the United States.

Thus, when the trespasses occurred on the Arctic Slope before the United States' termination of the Inupiats' aboriginal title in the ANCSA, causes of action for trespass and other torts accrued to the Inupiats against the trespassers. The Inupiats were entitled to present these accrued causes of action to the courts for adjudication and award of money damages, whether or not they had aboriginal title at the time of trial.

2. Prior litigation establishes finally that ANCSA took the Inupiats' trespass actions. *United States v. Atlantic Richfield Co.*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). This was a taking of valuable property rights for which the Inupiats are entitled to just compensation.

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[13] "The fact that a plaintiff transfers the property after the trespass does not divest him of his right of recovery if the injury was inflicted during the time of his control of the property." 75 Am. Jur. 2d "Trespass" § 26 (1974); *Bowman v. Hibbard*, 314 Ky. 688, 236 S.W.2d 938, 941 (1951).

[14] A condemnee's causes of action for prior trespasses to possession remain in existence unless litigated in the condemnation proceedings and expressly provided for in the award. *See, e.g., Wehrum v. Lincolnwood*, 91 Ill. App. 2d 418, 235 N.E.2d 343 (1968); *Cochran Coal v. Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955)' *citing with approval Shevalier v. Postal Telegraph Co.*, 22 Pa. Super. 506 (1903), and *Keil v. Chartiers Val Gas Co.*, 131 Pa. 466, 19 A. 78, 79 (1890); *Tuttle v. State*, 138 Misc. 1, 244 N.Y.S. 553 (1930); *Terhune v. Gorham*, 225 Ky. 249, 8 S.W.2d 431 (1928); *Fort Worth v. Dietert*, 271 S.W.2d 299 (Tex. Civ. App. 1954); *Texas Pipeline Co. v. Ennis*, 57 S.W.2d 178 (Tex. Civ. App. 1933); *rev'd on other grounds*, 127 Tex. 470, 93 S.W.2d 148 (1933); *see generally* 33 A.L.R.3d 1132 and cases cited therein.

This court has consistently held that accrued causes of action are property rights protected by the Fifth Amendment.

> A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve any wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged.

Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 151 U.S. 1, 19 (1894); *accord, Logan v. Zimmerman Brush Co.*, —— U.S. ——, 102 S.Ct. 1148 (1982).[18]

The holdings of this Court, we submit, are clear that a trespass by someone other than the United States to land to which Indians hold unextinguished aboriginal title results in a right of action by the Indians against the trespasser. This right of action, in turn, is a property right that cannot be taken by Congress without payment of just compensation.

3. The Court of Claims, in ruling to the contrary, cites no case holding that a tribe's trespass action—against third parties—is less protected than the trespass actions of non-Indians. The court reasoned that (App. 12a):

> The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the

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[18] Other cases to the same effect: *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Farberwerke, Vormals, Meister, Lucius & Bruning v. The Chemical Foundation, Inc.*, 39 F.2d 366, 371 (3d Cir. 1930), *aff'd*, 283 U.S. 152 (1931); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913); *Cincinnati v. Louisville & N.R.R.*, 223 U.S. 390, 400 (1912); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882); *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872); *Pacific M. S.S. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865).

aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the lands possessed under that title, it made a political decision not subject to judicial reexamination. Congress's authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title. *Cf. Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (purely statutory claims subject to extinction after vesting before judgment).

This reasoning is flawed. It ignores the difference between the Indians' unprotected ownership rights against the United States and their protected rights of possession against third parties. There is no sovereign obligation to pay for extinguishing aboriginal title, but there is an obligation on third parties to pay for their trespasses on aboriginal title. Indians have no right of action against the sovereign for extinguishing aboriginal title, but they do have rights of action against persons who trespass on that title before it is extinguished. And although these rights of action—like other property—may be taken by the Government, just compensation must be paid for the taking.

When the trespass occurred in the 1960's, the Inupiat's aboriginal title was *not* extinguished. When the Inupiats' right to redress for uncontested interference with possession—trespass causes of action—accrued, those causes of action became legally protected rights wholly separate from the Inupiats' rights to the land that was trespassed against. The Fifth Amendment's protection applied to the Inupiats' causes of action even though it did not require payment for their underlying interest in the land.[16]

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[16] The situation is similar to that of a tenant at will. Because the right to damages for trespass is based on occupancy rather than ownership, even an unprotected occupant receives a protected right to redress for trespass. For example, a tenant at will can be evicted at any time, but if during a time of rightful occupancy a third

Just as in *Logan v. Zimmerman Brush Co.*, —— U.S. ——, 102 S.Ct. 1148 (1982), where the Illinois legislature could (and did) repeal the statute giving rise to the employment discrimination claim in that case, see 449 U.S. at —— n.1, 102 S.Ct. at 1152 n.1, so here the fact that Congress could (and did) take the Inupiats' aboriginal title to land without paying just compensation does not mean that causes of action for compensation that accrued before the taking are not constitutionally protected property. *Accord, Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1, 50 (1912).

The Court of Claims' passing reference ("*Cf.*") to the Second Circuit's decision in *Battaglia v. General Motors* (App. 12a) shows the weakness of its argument. No case of this Court or of the Courts of Appeals can be cited that authorizes the kind of uncompensated taking of causes of action present here. Even *Battaglia* refers only to purely statutory claims. Yet the Inupiat claim here is a federal common law claim established by years of this Court's jurisprudence. It is not a statutory claim. Moreover, to the extent *Battaglia* has any relevance, it is of questionable authority in light of this Court's decision last Term in *Logan v. Zimmerman Brush Co., supra*, which recognizes that even a statutory

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party comes on the tenant at will's land and destroys his house, the tenant has a protected right to redress. Nothing the fee owner might do in terminating the tenancy can affect the tenant at will's accrued cause of action against that third party.

The Indian's aboriginal rights of possession are at least as great as those of a tenant at will. *See* 18 Op. Att'y. Gen. 563 (1887). Like a tenant at will, the Indians' right of occupancy may be terminated without compensation (although in the case of the Indian an act of Congress is required), but until terminated, the Indians' right of occupancy is "as sacred as the fee-simple of the whites." The Indian, like the tenant at will, is entitled to redress for wrongful interference with his occupancy, and if his accrued right to redress is taken, there must be just compensation.

claim creates a cause of action that is subject to constitutional protection.

The Court of Claims' suggestion that Congress' taking of Inupiat trespass causes of action was a "political decision not subject to judicial re-examination" (App. 12a), further reflects the weakness of its holding. The concept that Indian legislation is immune from judicial review under the Fifth Amendment was expressly repudiated by this Court in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977). Whether, how and when, Indian property is to be taken by the sovereign may be nonjusticiable in some cases, but once a taking occurs, the questions whether compensation is due and what compensation is just are always justiciable. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416-417 (1980); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

As to some of the Inupiats' causes of action, the Court of Claims also held that because § 4(a) of ANCSA had retroactively extinguished portions of the Inupiats' aboriginal title, the third party entries on those lands were not trespasses.[17] But this is no more than verbal sleight of hand. Before ANCSA the Inupiats had valuable rights of action against these trespassers. After

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[17] App. at 7a. The Court below based this ruling on the Ninth Circuits' holding in *Atlantic Richfield*, 612 F.2d at 1135, and further ruled that the Inupiats were collaterally estopped from challenging that ruling of law (App. 8). Even assuming that collateral estoppel applies to a pure question of law, it does not apply here. Under 28 U.S.C. §§ 1346, 1491, the Court of Claims has exclusive jurisdiction over taking claims in excess of $10,000. The Ninth Circuit in *Atlantic Richfield* could not decide whether a taking of property had occurred that required compensation and, indeed, expressly stated that it had not. 612 F.2d at 1139. Regardless of the characterization placed on ANCSA in *Atlantic Richfield*, the Inupiats are entitled to have the Court of Claims review section 4(a) of that Act to determine whether it took property for which just compensation is required.

ANCSA, those rights were gone. However the process is characterized, the result is that property rights are taken.

> [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart J., concurring); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) (shipowner with vested right to refund of illegal tolls may not have his cause of action taken by a statute retroactively ratifying collection of the tolls).

4. Certiorari should be granted to review the Court of Claims' decision, contrary to this Court's settled precedents, that the Inupiats' common law causes of action can be taken by Congress without payment.[18]

II. WHETHER THE UNITED STATES HAD A FIDUCIARY DUTY ENFORCEABLE BY MONEY JUDGMENT TO PROTECT THE INUPIATS FROM TRESPASS IS AN IMPORTANT FEDERAL QUESTION DESERVING THIS COURT'S ATTENTION

The Inupiats presented as an alternative claim, for the same damages as the claim for ANCSA's taking of trespass causes of action, a claim for ANCSA's taking of certain causes of action for breach of fiduciary duty which had accrued to the Inupiats against the United States before the ANCSA. The Court of Claims ruled that no claim for money damages for such breach could

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[18] It is possible that the Court of Claims sought reasons to rule against the Inupiats because they received both land and money under ANCSA. But that issue cannot be decided on a motion to dismiss. Whether ANCSA's benefits are also just compensation for Inupiat trespass causes of action is a factual issue to be decided in a hearing on the merits. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). At a minimum the Inupiats are entitled to that hearing.

be asserted because under *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (June 7, 1982) (No. 81-1748), sovereign immunity had not been waived (App. 13a-17a).

There is no question that the United States had a fiduciary duty to protect the Inupiat's land from trespass. The United States says so itself. In *United States v. Berrigan*, 2 Alas. Rpts. 442 (D. Alaska 1905), the United States, as trustees for a large group of Alaska Natives, successfully brought suit to enjoin trespass to land used by the Natives as a village site. In *United States v. Cadzow*, 5 Alas. Rpts. 125 (D. Alaska 1914), the United States, again acting as trustee for a communal Native group, successfully obtained injunctive relief against trespass to lands used or occupied by the Natives.

The Government has specifically acknowledged and affirmatively asserted its trust obligation to protect the Inupiats' right of occupancy to their aboriginal Arctic Slope lands. In its *Atlantic Richfield* complaint, the United States "as trustee" sought to recover damages for wrongful trespass "on lands held by the United States for the use and occupancy of the said Eskimos." [19] In response to interrogatories the United States answered under oath that it had had a trust relationship with the Inupiat Eskimos since the Treaty of Cession.[20]

But the Court of Claims held that the Inupiats have no right to enforce that fiduciary duty through suit against the trustee for money damages—that the statutes creating the trust responsibility cannot fairly be read as creating such liability (App. 13a-17a).

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[19] Amended complaint of the United States, ¶¶ I-II, p. 3, *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977).

[20] United States' answers to interrogatories of defendant Nabors Alaska Drilling, Inc., at 1-3 (Nov. 19, 1975), *United States v. Atlantic Richfield Co.*, *supra*.

This Court has this term issued a writ of certiorari to review the Court of Claim's decision in *Mitchell v. United States* on the same question but different statutes and a different fact situation.[21] The right of Native American tribes to sue the United States for current breaches of trust responsibility—and thus the only incentive of the United States to manage its trust lands with care—is very alive today in tribal contexts as well as with respect to individual allottees. The question deserves this Court's attention in the context of this case as well as in *Mitchell*.

III. JUSTICE REQUIRES THAT THE WRIT BE ISSUED

This case does not concern wrongs committed long ago to people long dead, which present compensation can never undo. The victims of these trespasses are very much alive, and the memory of the harsh tactics of the oil companies in disrupting their lives and desecrating their holy places is still vivid. There is no dispute that the Inupiats had valuable causes of action in trespass. There is no dispute that the United States, for what it viewed as pressing reasons of public policy, took those causes of action away. The Inupiats argue that they have never received just compensation for this admitted taking. No court has ever heard that claim. Unless the judgment below is reversed, no court ever will. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But the Court of Claims has said that the Inupiats' right of

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[21] *Mitchell* concerns management of allottees' timber estates giving considerable discretion to the allottees. Here the basic protection of tribal property wholly under the United States' trust responsibility is at issue.

action—unlike a white man's[22]—is not constitutionally protected. The inability of the Inupiats to get a hearing on the merits of their claim in any court leaves them festering with frustration and injustice.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision of the Court of Claims dismissing the Inupiats' petition should be reversed.

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August 31, 1982

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[22] Compare *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring in part and dissenting in part) (footnote omitted): "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 596-77

(Decided June 2, 1982)

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge*, KUNZIG * and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

The Inupiat Community is a recognized tribe of Eskimos inhabiting the Arctic or North Slope of Alaska. The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976 & Supp. III 1979) ("Settlement Act"), extinguished the Eskimos' interest in that land. *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1135-38 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980), discussed below, held that the Settlement Act also extinguished the Eskimos' claims for trespasses of other

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* Before his death, Judge Kunzig participated in the oral argument and agreed with the disposition of this case.

persons upon those lands that occurred prior to the Settlement Act.

This suit seeks just compensation for the alleged taking by the United States through the Settlement Act of two categories of claims of the Eskimos that arose prior to the Act and that the Act extinguished: (1) claims based upon trespasses by third parties to the land; (2) claims against the United States for various alleged breaches of the government's fiduciary duties to the Eskimos, and the alleged denial by the United States of due process to the Eskimos. The defendant has moved to dismiss and the plaintiff has moved for partial summary judgment on liability. We heard oral argument. We hold for the defendant and dismiss the petition.

I.

The Arctic Slope is an area of 56.5 million acres " 'between the summit line of the Brooks Mountain Range and the shore of the Arctic Ocean, from north to south, and from the Canadian Border to Point Hope, from east to west.' " *Edwardsen v. Morton*, 369 F. Supp. 1359, 1363 n.1 (D.D.C. 1973), *dismissed as moot*, No. 2014-71 (February 16, 1977) (citation omitted). The Slope includes Prudhoe Bay, the site of extensive oil production in Alaska today. Prior to the Settlement Act, the Inupiats claimed Indian or aboriginal title to this land.

The treaty of cession of Alaska in 1867 conferred full rights of citizenship upon Alaskans "with the exception of uncivilized native tribes. . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Treaty on Alaska, March 30, 1867, United States-Russia, art. III, 15 Stat. 539, 542. Subsequent statutes continued the status quo for the most part, *see infra* at 12-14, since Congress never dealt comprehensively with the question of Eskimo lands.

When Alaska became a state in 1959, it was authorized, within 25 years of its admission into the Union, to select more than 100 million acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection" for its own. Alaska Statehood Act § 6(b), 48 U.S.C. note prec. § 21 (1976).

In the 1960's, interest developed in the North Slope as a source of oil. Alaska applied for land patents in the area. The Secretary of the Interior tentatively approved the applications. The Statehood Act does not require Eskimo participation in the process, *id.* § 6(g), and none occurred.

The Eskimos, however, complained that they occupied the patented lands and that therefore the lands were not "vacant, unappropriated, and unreserved." The Secretary then stopped granting tentative approvals and withheld final approval of earlier patents. Alaska challenged this action judicially, and the court upheld the Secretary on the ground that occupied lands were not eligible for state selection. *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970). Under the Statehood Act, however, Alaska was authorized to and did grant conditional leases to the lands that the Secretary tentatively had patented. Alaska Statehood Act § 6(g).

Under the authority of these leases and, the Inupiats claim, in some instances without authority, many oil companies sent exploratory teams to the area. The Inupiats contend that these explorations were trespasses on their land. They assert that the teams damaged the whaling industry; destroyed graveyards; polluted water supplies; scared away fish and game; damaged buildings, campgrounds, cellars and other physical structures; built airports; converted chattels; and caused physical damage to the land. The Inupiats contend also that they should have been paid for the oil companies' use of the land, including the amount the companies would have paid for exploratory rights.

The Inupiats instituted suit in the United States District Court for the District of Columbia against the Secretary of the Interior and three Department officials, alleging that the Secretary's tentative approval of the land patents was invalid and hence that all the leases Alaska had issued also were invalid. They sought a declaratory judgment that the patents and leases were invalid and damages for the trespasses and the government's alleged breaches of its fiduciary obligations to them. Shortly after the suit was filed, however, Congress passed the Settlement Act.

Congress found "an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). It said, "[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, [and] without litigation." *Id.* § 1601(b). Accordingly, section 4 of the Settlement Act provided:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the

> laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Id. § 1603.

In exchange, Congress gave the Alaskan Natives collectively $962,500,000 and 40 million acres of land in fee simple. *Id.* §§ 1605, 1611, 1613(h). As their share of the award, the Inupiats received approximately $48 million in periodic payments and approximately 5 million acres of land.

On the government's motion for summary judgment, the district court held in the Inupiats' suit that sections 4(a) and (b) extinguished all the Eskimos' land claims and validated Alaska's land patents and the leases under them. *Edwardsen*, 369 F. Supp. at 1376-78. The court, however, refused to dismiss the Eskimos' damage claims. It held that the Settlement Act, particularly section 4(c), had not extinguished the claims for trespass against the trespassers, the claims for breach of fiduciary duty against the federal officials for allowing the trespasses, and the claims for denial of due process in the approval of the land patents. *Id.* at 1378-79. The court further held that the fifth amendment protected those claims. *Id.* at 1379.

In settlement of those remaining claims, the government, on behalf of the Eskimos, agreed to and did sue the State of Alaska and the various trespassers for their trespasses. The Inupiats intervened in the suit. The United States District Court for the District of Alaska held that section 4 extinguished the trespass claims. It ruled that section 4(a) retroactively extinguished the Inupiats' aboriginal title to most of the land, thereby validating most of the entries. It also held that section 4(c) extinguished all claims based on aboriginal title and that because such title would be an essential element of all the trespass claims, the claims were extinguished. *United*

States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1022-29 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). The court further held that the trespass claims were not constitutionally protected property interests. *Id.* at 1029-31. (Almost four months before that decision, the District Court for the District of Columbia had dismissed the remaining portions of the *Edwardsen* suit.)

On appeal, the Ninth Circuit affirmed the ruling that the trespass claims were extinguished. It "agree[d]" with the district court's holding "that § 4(a) was retroactive, and thus that the entries under federal authorization and the conditional state leases . . . were not trespasses." 612 F. 2d at 1135. The court held also that section 4(c) extinguished all trespass claims. *Id.* at 1135-39. "We hold that the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." *Id.* at 1134 (footnote omitted). The court found it unnecessary to decide "whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States." *Id.* at 1139. The court noted that this and other questions it left open "[p]erhaps . . . will be decided" in the present case.

II.

The Inupiats filed the present suit before the Ninth Circuit's decision in *Atlantic Richfield*. The complaint contains five causes of action: a) for breach of the government's fiduciary duty to protect the Inupiats by allowing the trespasses; b) for breach of fiduciary duty in authorizing some of the trespasses; c) for breach of fiduciary duty in failing to take legal action against the trespassers; d) for denial of due process because the Inupiats were not given notice and an opportunity to be heard on Alaska's land patent applications; and e) alternatively, for a com-

pensable taking, by the Settlement Act, of the Inupiats' claims against the government and the trespassers.

In their briefs and at oral argument, however, the Inupiats stated that in light of *Atlantic Richfield* the sole issue before us is whether there has been a taking by the United States of various claims of the Inupiats, for which the Eskimos are entitled to just compensation.

III.

The government argues that we have no jurisdiction over any of the claims and that the statute of limitations bars all but the trespass taking claim.

A. The government points to section 2(f) of the Settlement Act, which provides that "no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor [sic] to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of the Act." 43 U.S.C. § 1601(f). The government argues that Congress thereby barred this court from exercising jurisdiction in any case involving the Settlement Act.

Section 2(f) does not so provide. It merely makes explicit that the Settlement Act does not give the courts any additional jurisdiction. It does not limit the courts' existing jurisdiction. *Edwardsen*, 369 F. Supp. at 1381.

The government, relying upon *United States v. Testan*, 424 U.S. 392, 400 (1976), argues that the court has no jurisdiction because there is no statutory waiver of sovereign immunity that mandates the payment of money. The general rule in taking cases, however, is that a promise to pay just compensation is implied unless Congress has explicitly disavowed it. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-27 (1974); *accord*, *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981); *Testan*, 424 U.S. at 401. There has been no disavowal here. *See*

supra at 6. The Inupiats' claims now are all taking claims and therefore are cognizable under this principle.

B. The Inupiats filed their petition in this case on December 16, 1977, slightly less than six years after the Settlement Act became effective on December 18, 1971. The government argues that the fiduciary duty and due process claims are time-barred under 28 U.S.C. § 2501 (1976), because the events which gave rise to the claims took place more than six years before the petition was filed. The claims, however, are all for takings, and the alleged act of taking was the Settlement Act. The claims therefore accrued on December 18, 1971, the date on which the Settlement Act became effective. The suit therefore is timely.

IV.

A. With respect to the claims for trespasses committed under the authority of the temporary federal land patents and the temporary state leases (which, according to the court in *Atlantic Richfield* were "the bulk of all the entries," 612 F.2d at 1135), *Atlantic Richfield* held that because section 4(a) of the Settlement Act was retroactive, those entries "were not trespasses." *Id.* In other words, since the Settlement Act extinguished the aboriginal title of the Inupiats retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespass upon any protectible interest the Eskimos had. Accordingly, on the effective date of the Settlement Act the Inupiats no longer had any claims for trespass. The Act, therefore, did not take those trespass claims.

The plaintiff and the defendant in this case were parties in *Atlantic Richfield*. The validity of those trespasses was litigated there, and is binding, by collateral estoppel, on the Inupiats' claim for just compensation for the taking of this group of claims for trespass based upon entries pursuant to the federal patents and the state leases. *Montana*

v. United States, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48-49 (1897).

B. We reach the same result with respect to the taking of the Inupiats' claim for trespass on lands not covered by the federal patents and state leases, but for different reasons. This reasoning is equally applicable to the trespass claims for the land covered by the patents and leases, and therefore is an alternative ground for the result reached in part IV A.

Atlantic Richfield held that section 4(c) of the Settlement Act "extinguished *all* trespass claims," including trespasses on lands not federally patented and state leased. 612 F.2d at 1135 (emphasis in original). In support of that conclusion, the court referred to the statement in the Conference Committee Report that "the language of settlement is to be broadly construed to eliminate" "*all* aboriginal claims and *all* aboriginal land title . . . as any basis for any form of direct or indirect challenge to land in Alaska." S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 40 (1971); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess, 40, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2247, 2253 (emphasis in original). The court also pointed to the statement of former Justice Goldberg, who represented the Alaska Federation of Natives in hearings on the legislation in 1969, that "the Natives . . . are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 301 (1969) (statement of Hon. Arthur J. Goldberg).

On the basis of this and other legislative history, the court concluded that it would be "incomprehensible to us if Congress did not intend to extinguish the trespass claims, along with all other claims based on aboriginal title, when it gave the Natives over 60,000 square miles of fee simple

land and almost a billion dollars." 612 F.2d at 1137 (footnote omitted).

Although the Inupiats are bound by the decision in *Atlantic Richfield* that the Settlement Act extinguished all of their trespass claims, they now seek to recover from the United States the value of the very claims for the extinguishment of which the United States gave the natives $962,500,000 and 40 million acres of land. We agree with the government that the extinguishment of the Inupiats' claims based upon trespasses to their aboriginally held land was not a taking for which the Eskimos may recover just compensation under the fifth amendment. This conclusion follows from the special nature of aboriginal title (of Eskimos and Indians) and the broad power of the United States to extinguish it without payment.

Aboriginal title is a right of occupancy based on possession from time immemorial. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Such title may be recognized or unrecognized. If recognized, its extinction is compensable; the taking of unrecognized title is not compensable. *Id.* at 338-40. The Inupiats claim only unrecognized title.

In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court approved a decision of this court that the United States was not required to pay just compensation for taking timber from land in Alaska the Indians held by unrecognized aboriginal title. The Court stated that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment . . . because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285. The court explained that unrecognized aboriginal title

> means mere possession not specifically recognized as ownership by Congress. . . . This is not a property

> right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

The Court quoted with approval the following statement from *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 347 (1941):

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.

348 U.S. at 281.

The Inupiats' suit against the United States for a taking of their trespass claims is based upon their aboriginal title. It was because of that title that they were on the land in the first place; and it was the interference with their possession of the land under that title that was the basis of their trespass claims.

The Inupiats' presence on and use of the land, and the scope, measure, and form of the protection of that presence and use were matters within the exclusive authority and discretion of Congress. Unrecognized aboriginal title is "a right of occupancy which the sovereign grants and protects." *Tee-Hit-Ton*, 348 U.S. at 279. The Inupiats could use the land only to the extent that Congress protected their right to do so. Congress could protect or fail to protect this land as it saw fit.

When, in the Settlement Act, Congress extinguished both the Inupiats' aboriginal title and "[a]ll claims against the United States, the State and all other persons that are based on claims of aboriginal right, title, use, or

occupancy of land," 43 U.S.C. § 1603(c), it terminated not only the Inupiats' title but any claims based upon that title. The Inupiats' right to sue for trespass was merely one aspect of the protection Congress provided for their aboriginal title. The extent and measure of that protection lay within the discretion of Congress to determine.

As noted, "[t]he manner, method, and time" of the extinguishment of aboriginal title "raise political, not justiciable, issues." *Tee-Hit-Ton*, 348 U.S. at 281; *Santa Fe*, 314 U.S. at 347. The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the land possessed under that title, it made a political decision not subject to judicial reexamination. Congress' authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title. *Cf. Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (purely statutory claims subject to extinction after vesting before judgment).

The Inupiats argue, however, that their situation should be analogized to that of a tenant at will who, after his tenancy has been terminated, may maintain an action for trespasses committed before termination. The analogy fails because of the special and limited nature of aboriginal title and the broad discretionary authority of Congress to extinguish such title upon whatever terms and conditions it deems appropriate.

For the same reasons, the Inupiats' further reliance upon cases that have defined the rights of Indians living upon reservations created by Executive order must be rejected. Those cases, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949), and *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 685-87 (9th Cir.

1976), held that Indians living on such reservations, whose rights in many respects are similar to rights under aboriginal title, could bring suits to protect the land from trespasses. The cases never considered whether Congress could abolish such claims as a function of abolishing the reservations. The cases thus are inapposite.

V.

The Inupiats further contend that the United States breached its fiduciary obligation to them by authorizing and failing to prevent the trespasses that occurred prior to the Settlement Act. They argue that they had enforceable damage claims against the United States based upon those breaches of fiduciary duty and that the Settlement Act constituted a taking of those claims for which they are entitled to just compensation. The reasons set forth in part IV B for rejecting the claim of a taking of the trespass claims apply equally to the alleged taking of the fiduciary obligation claims which, like the taking claims, are based upon the Inupiats' aboriginal title. These claims also are invalid for another reason.

The legal sufficiency of this group of taking claims depends upon whether the government's alleged breach of fiduciary obligations created claims that the Inupiats could have enforced through suit in this court against the United States for damages.

In *Mitchell v. United States*, 229 Ct. Cl. ——, 664 F.2d 265 (1981), we recently summarized the law in this court governing the maintenance of claims by Indians based upon the government's alleged violation of its fiduciary obligations to them. Where, as in the present case, the alleged fiduciary duty stems from a statute, the statute "must be capable of being fairly 'interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at ——, 664 F.2d at 267-68 (citation omitted). The court pointed out that although "the substantive right to money" need not "be explicitly

stated in the substantive legislation itself, . . . Congress's waiver of sovereign immunity with respect to money compensation must be clear or strong before the court can say that the statute mandates compensation." *Id.* at ——, 664 F.2d at 268-69 (footnote omitted).

Applying those principles, we held that in certain of the statutes upon which the Indians relied, Congress mandated the payment of compensation, *id.* at ——, 664 F.2d at 269-73, but that other statutes were "almost purely regulatory, involving Congress's plenary power over Indians, and do not themselves mandate any compensation to the plaintiffs" for the alleged injury for which they sought compensation. *Id.* at ——, 664 F.2d at 275.

In the present case, the Inupiats rely upon a number of statutes which, according to them, mandate the payment of compensation. We disagree and conclude that they are only regulatory provisions that do not waive the government's sovereign immunity.

A. 1. Section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26, provides

> [t]hat the Indians or other persons in said district [of Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for furture legislation by Congress.

In *Tee-Hit-Ton*, the Court held that this statute did not recognize the Eskimos' aboriginal title. 348 U.S. at 277-79. "Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken." *Id.* at 278 (footnote omitted).

This statute, unlike the statutes that we held in *Mitchell* conferred a right to sue for money, does not deal with the government's management of "Indian-owned prop-

erty . . . from which Congress clearly wanted the Indians to obtain the financial benefits." 229 Ct. Cl. at ——, 664 F.2d at 273.

2. The Act of March 3, 1891, ch. 561, § 14, 26 Stat. 1095, 1100, states that "none of the provisions of the last two preceding sections of the act shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska shall have prior rights by virtue of actual occupation." This statute, like the one just discussed, does not deal with the government's management of Eskimo property and similarly does not mandate compensation.

3. Section 7 of the Act of May 14, 1898, ch. 299, 30 Stat. 409, 412, exempts Indian reservation lands from being subject to the homestead laws and the private condemnation of rights-of-way for railroads. It does not refer to aboriginal title lands and is inapplicable here.

4. The Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330, provides that "Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation . . .; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States." This statute also was considered in *Tee-Hit-Ton* and was found not to recognize the Eskimos' aboriginal title, but only to continue the status quo. 348 U.S. at 277-79. Once again, it has nothing to do with government management of Eskimo property and is not a waiver of sovereign immunity.

5. The Nonintercourse Act, 25 U.S.C. § 177 (1976), prohibits the purchase of an interest in land from Indians except by treaty. It provides that

> [e]very person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention . . . or to treat with any such nation or tribe of Indians for the title or pur-

> chase of any lands by them held or claimed, is liable to a penalty of $1,000.

There is nothing here that waives sovereign immunity.

6. Finally, the Inupiats rely on section 4 of the Statehood Act, which provides that Alaska and its people

> disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for such natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority.

This, however, is nothing more than a recognition of federal supremacy. It imposes no duty on the federal government.

B. The Inupiats rely also on two regulations of the Department of the Interior. The first provides that

> [a]uthorized officers will ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by others than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

43 C.F.R. § 2091.5 (1981). The second provides that, "Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others." *Id.* § 2091.6-3. Neither regulation deals with federal management of the Eskimos' property. Moreover, only Congress, and not the Secretary of the Interior, can waive sovereign immunity.

C. The Inupiats cite the portion of the Tucker Act that gives this court jurisdiction over "any claim against

the United States . . . for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491 (Supp. IV 1980). They contend this phrase is both a substantive and a jurisdictional grant of authority and that it waives sovereign immunity.

We have rarely discussed this provision. In *Menominee Tribe of Indians v. United States*, 221 Ct. Cl. 506, 516-20, 607 F.2d 1335, 1342-44 (1979), we held that it was not a basis for jurisdiction of a nonconstitutional claim that Congress had breached its duty in enacting a statute. One commentator has written that, "The evident purpose of the section is to make clear that the action may seek unliquidated damages as well as sums illegally exacted or amounts fixed by contract. Indeed a literal reading of the language would swallow practically everything that precedes it." 1 J. MOORE, FEDERAL PRACTICE ¶ 0.65[2.-3] at 700.112 n.39 (1982).

Without adopting Professor Moore's reading of the phrase, we hold that this provision does not give us jurisdiction over claims for breach of fiduciary duty unless there also is a statute or a valid regulation mandating the payment of money.

VI.

The Inupiats' final claim is that the United States denied them due process because it did not give them notice of or the opportunity to be heard on Alaska's application for land patents, that they had a claim for damages against the United States for this denial of due process, and that the Settlement Act took that claim. As in the case of the claims for fiduciary obligations discussed in part V, the validity of this taking claims depends upon whether the Inupiats had a valid due process damage claim against the United States.

Since the due process claim obviously involves more than $10,000, it could have been brought only in this court and not in a district court. 28 U.S.C. §§ 1346(a)

(2), 1491 (Supp. IV 1980). We have frequently and consistently held, however, that we have no jurisdiction over claims for money based upon the government's alleged violation of the due process clause. *Conservative Caucus, Inc. v. United States*, 228 Ct. Cl. ——, 650 F.2d 1206 (1981); *Mack v. United States*, 225 Ct. Cl. ——, 635 F.2d 828 (1980), *cert. denied*, 451 U.S. 913 (1981); *Carruth v. United States*, 224 Ct. Cl. ——, 627 F.2d 1068 (1980).

The Inupiats point to *Davis v. Passman*, 442 U.S. 228 (1979), which implied a cause of action for damages based upon violation of the due process clause. The suit in *Davis*, however, was brought against a former Congressman as an individual, and the Court held only that the plaintiff had stated a valid cause of action against him. Nothing in the opinion even suggests that a similar suit could be maintained against the United States.

CONCLUSION

The defendant's motion to dismiss is granted, the plaintiff's motion for partial summary judgment is denied, and the petition is dismissed.

Office - Supr. Ct. U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-359

In the Supreme Court of the United States

OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to compensation, under the Fifth Amendment, for its aboriginal title trespass claims against third parties, which were extinguished pursuant to the Alaska Native Claims Settlement Act of 1971.

2. Whether the United States had a fiduciary duty, enforceable in the Court of Claims for money damages, to protect petitioner from third party trespasses on aboriginal title lands.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-18a) is reported at 680 F. 2d 122.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 31, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioner is a recognized tribe of Eskimos inhabiting the Arctic or North Slope of Alaska.[1] The Slope includes

---

[1] "The Arctic Slope is an area of 56.5 million acres " 'between the summit line of the Brooks Mountain Range and the shore of the Arctic Ocean, from north to south, and from the Canadian Border to Point Hope, from east to west.' " " Pet. App. 2a, quoting *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1363 n.1 (D.D.C. 1973), dismissed as moot, No. 2014-71 (Feb. 16, 1977) (citation omitted).

Prudhoe Bay, which is the site of extensive oil production in Alaska today. Prior to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* (ANCSA), petitioner claimed aboriginal title to this land (Pet. App. 1a-2a).

Pursuant to Section 6(b) of the Alaska Statehood Act, 48 U.S.C. note prec. 21, authorizing the State to select for itself 100 million acres of "vacant, unappropriated, and unreserved," public lands, Alaska filed applications covering vast acres of the oil-rich North Slope during the 1960s. Before November 1966, the United States tentatively approved these selections and the State granted conditional leases to oil companies for $912 million. *United States* v. *Atlantic Richfield Co.*, 612 F. 2d 1132, 1134 (9th Cir.), cert. denied, 449 U.S. 888 (1980) (*ARCO*). The bulk of the trespasses of which petitioner is complaining here arose from the exploratory operations of oil companies acting under the authority of these leases. *Ibid.*; Pet. App. 3a.

Congress enacted ANCSA in 1971, having found (43 U.S.C. 1601(a) and (b)) "an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims," and that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation." Section 4 of ANCSA provides (43 U.S.C. 1603):

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both

inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

In exchange, Congress gave the Alaskan Natives collectively $962,500,000 and 40 million acres of land in fee simple. 43 U.S.C. 1605, 1611 and 1613(h); Pet. App. 4a. As its share of the award, petitioner received approximately $48 million and approximately 5 million acres of land (Pet. App. 5a).

In *ARCO, supra*, the United States, on behalf of petitioner, sued the State of Alaska and 140 private parties and companies involved in the effort to exploit North Shore petroleum for pre-ANCSA trespasses to native lands.[2]

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[2]Prior to the enactment of ANCSA, petitioner and others sued the Secretary of the Interior and three Department officials, alleging that they had facilitated allegedly wrongful transfers of land to Alaska and issued purported authorizations for third-party trespasses on lands claimed by petitioner. *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1362 (D.D.C. 1973), dismissed as moot, No. 2014-71 (Feb. 16, 1977). Subsequent to ANCSA, the court held that that legislation did not extinguish petitioner's trespass claims against the trespassers, claims for breach of fiduciary duty against the federal officials for permitting the trespasses, and claims for denial of due process in the approval of the land patents. *Id.* at 1378-1397. In settlement of those remaining claims, the United States agreed to initiate the *ARCO* litigation on petitioner's behalf. Pet. App. 5a.

Petitioner intervened in the ARCO litigation, arguing that ANCSA did not extinguish its trespass claims against third parties based on aboriginal title.

Affirming the district court, the court of appeals rejected the claims of the United States and petitioner (612 F. 2d at 1136):

> In short, when Congress said in §§ 2(a) and 4(c) of the Act, 43 U.S.C. §§ 1601(a), 1603(c), that it was settling "all claims," it meant just that. Congress intended to and did extinguish all Native trespass claims based on aboriginal title.

The court of appeals advanced an alternative ground for rejecting the plaintiffs' claims with respect to those entries that were made under federal authorization and conditional state leases (which comprised the bulk of the entries). Such entries were not even trespasses, the court held (612 F. 2d at 1135), because Section 4(a) of ANCSA, 43 U.S.C. 1603(a), was retroactive, extinguishing aboriginal titles "as of the dates of the prior conveyances and tentative approvals of state selections." However, the Ninth Circuit expressly did not reach the question presented by this case, *i.e.*, whether the Fifth Amendment requires compensation for the United States' extinguishment of petitioner's trespass claims (see 612 F. 2d at 1139).

2. Prior to the Ninth Circuit's decision in *ARCO*, petitioner filed this action in the Court of Claims, seeking compensation for the United States' alleged taking of petitioner's trespass claims. Pet. App. 6a-7a. Following final disposition of *ARCO*, the Court of Claims granted the United States' motion to dismiss and denied petitioner's motion for partial summary judgment. Pet. App. 1a-18a.

The court first held that since both petitioner and the United States were parties to the *ARCO* litigation, petitioner was collaterally estopped from challenging the Ninth

Circuit's holding in that case that the activities undertaken under authority of federal land patents and state leases, which were the bulk of all entries, were not trespasses by virtue of the retroactive effect of Section 4(a) of ANCSA, 43 U.S.C. 1603(a). Pet. App. 8a-9a.

The Court of Claims further held that, regardless whether the entered lands were covered by federal patents and state leases, none of petitioner's trespass claims based on aboriginal title constituted property protected by the Fifth Amendment (Pet. App. 9a-13a). Relying on this Court's decision in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), the Court held that because petitioner's aboriginal title was unrecognized, it was not compensable. "Unrecognized aboriginal title is 'a right of occupancy which the sovereign grants and protects.' *Tee-Hit-Ton*, 348 U.S. at 279. The Inupiats could use the land only to the extent that Congress protected their right to do so. Congress could protect or fail to protect this land as it saw fit." Pet. App. 11a. Accordingly, because petitioner's "right to sue for trespass was merely one aspect of the protection Congress provided for [petitioner's] aboriginal title" (Pet. App. 12a), its extinguishment also was not compensable.

The Court of Claims also rejected petitioner's contention that it was entitled to compensation for its claims based on the United States' alleged breach of fiduciary duty in failing to prevent the pre-ANCSA trespasses. Pet. App. 13a-17a. The court concluded (Pet. App. 13a) that since these claims, like the claims for the trespasses themselves, also were based on aboriginal title, they likewise were not protected by the Fifth Amendment. The Court further held that it lacked jurisdiction over these claims for breach of fiduciary duty in the absence of any statute or regulation mandating the payment of money. Pet. App. 13a-17a.

Finally, petitioner contended that the United States denied it due process by failing to give it notice or an opportunity to be heard on Alaska's application for land patents, that it had a claim for damages against the United States for this denial of due process, and that ANCSA took that claim. The Court of Claims rejected this contention on the ground that its jurisdiction does not extend to claims for money based upon the United States' alleged violation of the due process clause. Pet. App. 17a-18a.[3]

ARGUMENT

The decision of the Court of Claims represents the application of settled law to the facts of this case, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review by this Court is not warranted.

1. While petitioner concedes (Pet. 3, 8) that Congress may extinguish aboriginal title without compensation, it argues (Pet. 9) that until such extinguishment "no one has a right to occupy or trespass on Indian land without the Indians' consent." Assuming this is a correct statement of the law, it is of no avail to petitioner here. The bulk of the entries of which petitioner is complaining were made under the authority of the federal land patents and conditional state leases. *ARCO, supra*, 612 F. 2d at 1135; Pet. App. 8a. As the court of appeals in *ARCO* correctly held (612 F. 2d at 1135), Section 4(a) of ANCSA, 43 U.S.C. 1603(a) (see page 2, *supra*), extinguished aboriginal titles retroactively, *i.e.*, "as of the dates of the prior conveyances and tentative approvals of state selections." Accordingly, even under

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[3]Petitioner does not seek this Court's review of the Court of Claims' resolution of that issue. Pet. 7 n.9.

petitioner's theory its aboriginal title had already been extinguished at the time of the alleged entries, which therefore were not trespasses. See 612 F. 2d at 1135.

In any event, petitioner's argument lacks merit even with respect to entries that were made in the absence of federal authorization or conditional state leases. Prior decisions of this Court foreclose petitioner's contention that its trespass claims based on aboriginal title were common law causes of action and therefore property protected by the Fifth Amendment.

In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), this Court held that the United States was not required to pay compensation for taking timber from land in Alaska that the Indians held by unrecognized aboriginal title. In so holding, the Court described the nature of unrecognized aboriginal title (*id.* at 279) as

> mere possession not specifically recognized as ownership by Congress. * * * This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[4]

Petitioner's presence on and use of the land, and the form and extent of the protection of that presence and use, thus

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[4]The Court quoted approvingly (348 U.S. at 281) from its previous decision in *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941):

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues."

were matters within Congress' exclusive authority and discretion. Specifically, petitioner's right to sue for trespasses by third parties was merely one aspect of petitioner's aboriginal title. As the Court of Claims held (Pet. App. 12a),

> [t]he right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the land possessed under that title, it made a political decision not subject to judicial reexamination. Congress' authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title.

Petitioner's claim against the United States for the alleged taking of its trespass claims is based squarely on its aboriginal title,[5] and that part is no greater than the whole. Since Congress could extinguish petitioner's aboriginal title, it could also extinguish the trespass claims based on it without paying compensation therefor.

The cases on which petitioner relies did not involve aboriginal title, but dealt rather with statutory and vested property interests.[6] In particular, *Logan* v. *Zimmerman Brush Co.*, No. 80-5950 (Feb. 24, 1982) (Pet. 13), involved

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[5]The Court of Claims explained (Pet. App. 11a): "It was because of that [aboriginal] title that [the Inupiats] were on the land in the first place; and it was the interference with their possession of the land under that title that was the basis of their trespass claims."

[6]Petitioner correctly concedes (Pet. 13) that its claim "is not a statutory claim." Similarly, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (Pet. 8), involved Indian interests protected by treaties. No treaty is involved here.

an employee's rights under a state fair employment statute, which this Court held created a form of property protected by the Due Process Clause of the Fourteenth Amendment.[7]

Petitioner's suggestion (Pet. 12-13 n.16) that its occupancy of aboriginal land was in the nature of a tenancy at will also is without merit. The court below correctly rejected this analogy because of "the special and limited nature of aboriginal title and the broad discretionary authority of Congress to extinguish such title upon whatever terms and conditions it deems appropriate" (Pet. App. 12a).

2. In the alternative, petitioner claims (Pet. 15-17) that it was entitled to compensation insofar as ANCSA "took" its asserted damages claims against the United States for breach of fiduciary duty in failing to prevent the pre-ANCSA entries. The Court of Claims correctly rejected this argument for the same reasons it rejected petitioner's claim for compensation based on the trespass claims themselves (Pet. App. 13a).

In addition, the court held that, even in the absence of ANCSA, the breach of trust claims could not be sustained for lack of a waiver of sovereign immunity (Pet. App. 13a-17a). This ruling is in full accord with *United States* v. *Mitchell*, 445 U.S. 535 (1980). There, this Court reaffirmed (*id.* at 538) that, in an action brought pursuant to 28 U.S.C. 1505, there must be a waiver of sovereign immunity, which cannot be implied but must be unequivocally expressed, and that, in the absence of such a clear congressional consent, the Court of Claims has no jurisdiction to entertain a suit against the United States. See also *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

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[7]Contrary to petitioner's suggestion (Pet. 13), the issue in *Logan* did not arise out of the repeal of the statute (slip op. 2 n.1), but rather out of the state agency's failure to meet the statutory deadlines binding on it, resulting in its losing jurisdiction over the employee's charge.

The Inupiats, like the respondents in *United States* v. *Testan, supra*, 424 U.S. at 400, quoting *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1009 (Ct. Cl. 1967), "do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " Petitioner admits (Pet. 13) that its third party trespass claims are not based on any statute or treaty. Nor has petitioner cited any statute imposing a duty on federal officials to protect it from third party trespasses on aboriginal title lands in Alaska.[8] A fortiori, there is no statute that creates a right to recover money damages from the United States. In the absence of any such legislation, the Court of Claims had no authority to award the damages sought by petitioner.

There is no merit to petitioner's suggestion (Pet. 16) that the government waives sovereign immunity by bringing suit on behalf of a native tribe, as the United States did in *ARCO, supra* (see pages 3-4, *supra*).[9] Only Congress can waive the United States' sovereign immunity; the prosecutorial activities and assertions of federal officials cannot. See *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

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[8]These facts distinguish this case from *Mitchell* v. *United States*, 664 F. 2d 265 (1981), cert. granted, No. 81-1748 (June 7, 1982), in which the Court of Claims assessed damages against the United States for its alleged breach of statutorily-imposed fiduciary duties. Indeed, the Court of Claims relied (Pet. App. 13a-14a) on its decision in *Mitchell* in rejecting petitioner's claim for compensation for alleged breach of fiduciary duty here.

[9]This Court made clear in *United States* v. *Mitchell, supra*, 445 U.S. at 542-544, that the United States can incur limited trust responsibilities with respect to Native Americans, which are not enforceable in the Court of Claims, ~~445 U.S. at 542-544.~~

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

DOJ-1982-10

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

THE UNITED STATES

PETITIONER'S REPLY MEMORANDUM

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The United States urges this Court to let stand the ruling below that Indians holding land under aboriginal title have fewer legal rights to protection against trespass than white persons under any form of possession known to the law. All cases to the contrary are distinguished on the sole ground that they "did not involve aboriginal title" (U.S. Br. at 8)—in other words, that they were not Indian claims. The general rule is that even trespassers in possession can assert trespass claims against persons who interfere with their possession. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1, 38 (1893); *Restatement (Second) of Torts* § 157, Comment b, § 158 (1965). Such claims, once accrued, could not be taken away without payment of just compensation for their taking. But, in the government's view, Indian rights are different.[1] This position has no support in American law.

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[1] Thus, the trespassing oil companies could have accrued causes of action against other trespassers—causes of action which, since

The government's position rests wholly upon the following reasoning:

> (i) The Inupiats' trespass actions are part of or based on their aboriginal title.
>
> (ii) The United States can take aboriginal title without compensation.
>
> (iii) Therefore, the United States can take the trespass actions without compensation.

See U.S. Br. at 8. Both the premise and logic of this argument are flawed.

The Inupiats' trespass actions were not part of their aboriginal title; once trespasses occurred and causes of action accrued against the trespassers,[2] these claims were property rights separate and distinct from the Inupiats' limited interest in their land.

The fact that the Inupiats' trespass claims were based on or grew out of their aboriginal title, which the United States could take without compensation, does not lead to the conclusion that the Inupiats' trespass claims could also be taken without compensation. "Aboriginal title" is nothing more than the name given to the common law possessory rights of aboriginal occupiers of land as those rights have been declared by this Court. *See, e.g., Tee-*

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in no way could they be said to depend upon aboriginal title, could not be taken by the government without the payment of just compensation. Only the Indians, in the government's view, lack such protection.

[2] Under classic common law definitions, such accrued claims were termed "choses in action" and were clearly distinguished from "choses" (items of personal property) and "real things" (items of real property). *See Black's Law Dictionary* 305, 1431 (4th ed. 1951). The United States' argument here that the Inupiats' "choses in action" and their real property interests were the same would be rejected out of hand in a common law court.

Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). To say that the Inupiats' trespass claims grew out of or were based on aboriginal title is simply to say that they grew out of or were based on the common law.

This Court has repeatedly held that rights that grow out of or are based on the common law—accrued causes of action—are constitutionally protected property, although the common law itself (*e.g.*, the rules of aboriginal title) is not a protected property right. Thus, Congress can repeal or amend common law prospectively at any time without compensation. However, once a cause of action has accrued under the common law, that cause of action is constitutionally protected and cannot be taken in the absence of due process and just compensation.

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. *Rights of property which have been created by the common law cannot be taken away without due process*; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. . . ." Munn v. Illinois, 94 U.S. 113, 134.

Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 50 (1912) (emphasis added); *accord*, *Coombes v. Getz*, 285 U.S. 434, 442 (1932).

The Inupiats' accrued trespass claims—valuable rights to collect damages from third parties—were distinct items of property at the time the United States took them. Under black-letter constitutional law, just compensation must be paid for that taking. Petitioner is therefore entitled to a hearing on the merits of its claim.

Respectfully submitted,

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